

JUN 16 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID MURILLO-BETANCOURT,

Defendant - Appellant.

No. 05-50381

D.C. No. CR-04-01994-LAB

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted June 9, 2006
Pasadena, California

Before: REINHARDT, TROTT, and WARDLAW, Circuit Judges.

David Murillo-Betancourt appeals his conviction for being a previously deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1. Murillo contends that the district court erred in denying his Rule 29 motion for acquittal. To convict Murillo of being “found in” the United States, the government had to prove that he “entered” the country free of official restraint. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000). While the government bears the burden of proof to demonstrate that an alien was not under constant surveillance from the time he crossed the border, *see United States v. Bello-Bahena*, 411 F.3d 1083, 1087 (9th Cir. 2005), it is entitled to reasonable inferences from evidence in the record and need not disprove every possible theory of official restraint, *see United States v. Castellanos-Garcia*, 270 F.3d 773, 776 (9th Cir. 2001).

The government presented the arresting officer, Aristeo Rangel of Customs and Border Protection, who testified that he was first alerted to the presence of Murillo by a call from dispatch that a seismic sensor had been tripped in Rangel’s patrol zone. Rangel testified that he found Murillo by tracking Murillo’s footprints into thick brush. Rangel denied using an infrared device to track or monitor Murillo, and he stated that there were no video cameras within the zone in which Murillo was captured. From the evidence presented at trial, a reasonable factfinder, reviewing the evidence in the light most favorable to the government, could infer that Murillo was not under constant surveillance from the time he

crossed the border until his capture. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1219 (9th Cir. 2001).

2. Murillo alleges he was precluded from presenting an “official restraint” defense because the district court prevented him from asking certain questions of Agent Rangel on cross-examination. The district court did not prohibit testimony relevant to the issue of official restraint, because defense counsel was able to ask relevant questions about cameras, infrared scopes, and the presence and location of Border Patrol agents on the night in question. *See United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 856 (9th Cir. 2005). The evidence precluded by the district court pertained to infrared scopes, cameras, and agents focused elsewhere in the border region and unrelated to the location where Murillo was found. Moreover, the district court did not preclude Murillo from calling any other agents as defense witnesses. *See Castellanos-Garcia*, 270 F.3d at 777. The district court did not abuse its discretion in limiting the cross-examination, and Murillo’s Sixth Amendment rights were not violated.

3. Murillo claims that 8 U.S.C. § 1326 violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the Sixth Amendment. These claims are foreclosed. The

exception for prior convictions, established by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), applies even when the prior conviction is not admitted during the plea colloquy nor proven to the jury beyond a reasonable doubt. *See United States v. Pacheco-Zepeda*, 234 F.3d 411, 415 (9th Cir. 2001) (as amended).

Relatedly, the date of an alien's prior deportation falls within the *Almendarez-Torres* exception and need not be found separately by a jury. *United States v. Salazar-Gonzalez*, 445 F.3d 1208, 1215 (9th Cir. 2006). *Almendarez-Torres* has not been overruled by more recent Supreme Court cases, *see United States v. Weiland*, 420 F.3d 1062, 1079 & n.16 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1911 (2006), nor has *Shepard v. United States*, 544 U.S. 13 (2005), undermined the viability of relying on *Almendarez-Torres* in § 1326 proceedings, *see United States v. Rodriguez-Lara*, 421 F.3d 932, 949-50 (9th Cir. 2005).

4. Murillo's challenge to the grand jury model instructions utilized in the Southern District of California is foreclosed by our opinion in *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir.) (en banc), *cert. denied*, 126 S. Ct. 736 (2005).

AFFIRMED.